

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of Qwest Communications International
Inc. and CenturyTel, Inc. d/b/a Century Link
Application for Transfer of Control Under Section 214
of the Communications Act, As Amended

WC Docket No. 10-110

**OPENING COMMENTS OF BROADVOX-CLEC, LLC
ON APPLICATIONS FILED BY QWEST COMMUNICATIONS INTERNATIONAL
INC. AND CENTURYTEL, INC., D/B/A/ CENTURYLINK FOR CONSENT
TO TRANSFER OF CONTROL**

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Broadvox-CLEC submits these Opening Comments in response to the Federal Communications Commission's (FCC) Public Notice released May 28, 2010 soliciting comments on the proposed merger between Qwest Communications International Inc. ("Qwest") and CenturyTel, Inc. d/b/a CenturyLink ("CenturyLink"). Broadvox-CLEC submits that the proposed merger is not in the public interest because it will further concentrate the market power of the two utilities, thereby giving the merged entity greater opportunity to impede competition in the wholesale market. Such harms, however, may be mitigated if the FCC requires Qwest and CenturyLink to commit to certain safeguards that ensure that the merged entities will deal with competitive local exchange carriers ("CLECs") such as Broadvox-CLEC in a good faith and non-discriminatory manner. Absent such safeguards, the proposed merger would not be in the public interest, and therefore should not be approved.

I. Legal Standard for Merger Review

Pursuant to 47 U.S.C. § 214(a), when reviewing a merger application of a utility, the Commission must undertake a multi-part review. The Commission must first determine whether the proposed merger complies with the specific provisions of the Telecommunications Act, other applicable statutes, and the Commission's rules.¹ Even if the proposed transaction would not violate a statute or rule, the Commission must consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.² Finally, the Commission must employ a balancing test weighing any potential public interest benefits of the merger against all potential public interest harms.³ The applicants must demonstrate through a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.

¹ See e.g., *Applications Filed for the Transfer of Control of Embarq Corp. to CenturyTel, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8741, 8745-46 (2009) ("*CenturyTel/Embarq Merger Order*"); *AT&T, Inc. and Bell/South Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5663 (2007) ("*AT&T/BellSouth Merger Order*").

² *CenturyTel/Embarq Merger Order*, at 8745-46.

³ *CenturyTel/Embarq Merger Order*, at 8746; *AT&T/BellSouth Merger Order*, at 5663.

The FCC has noted in prior merger reviews that the public interest evaluation “necessarily encompasses” the broad aims of the Communications Act, which include, among other things, “a deeply rooted preference” for competition, whether the merger will affect the quality of communications services and will result in the provision of new or additional services to consumers.”⁴ The FCC’s analysis must take a broad view of competition, and determine “whether a transaction will enhance, rather than merely preserve, existing competition. . . .”⁵ If the FCC determines that a proposed merger could harm the public interest (for example by impeding competition), it has authority to impose and enforce conditions that ensure that the public interest is served by the transaction.⁶

In evaluating the CenturyLink/Embarq merger, the FCC determined that transaction might increase those entities’ incentive and opportunity to engage in anticompetitive activity. For example, the FCC noted that the merged entity could export practices that impede competition from one service area to the other.⁷ To address these anticompetitive effects of the merger, the FCC required CenturyLink and Embarq to submit and follow a set of commitments to prevent anticompetitive conduct, particularly against wholesale customers. The strikingly similar CenturyLink/Embarq merger, which was finalized just over a year ago, provides a compelling roadmap for the evaluation of the instant merger.

II. Embarq Refuses To Negotiate ICAs in Good Faith or to Allow CLECs to Adopt Existing ICAs As Required Under the Telecommunications Act

When Congress passed the Act it created a new telecommunications regime expressly intended to encourage competition in the local telecommunications marketplace. Section 257 of the Act expressly requires the removal of barriers to entry for entrepreneurs providing telecommunications and information services, and encourages “vigorous economic competition” and “technological advancement.” To further local competition, Sections 251 and 252 of the

⁴ *CenturyTel/Embarq Merger Order*, at 8747.

⁵ *CenturyTel/Embarq Merger Order*, at 8747.

⁶ *CenturyTel/Embarq Merger Order*, at 8747.

⁷ *CenturyTel/Embarq Merger Order*, at 8755.

1996 Act impose specific duties on ILECs and establish a mechanism for implementing them. Section 251(c)(1)⁸ of the Act requires ILECs to negotiate ICAs with CLECs in good faith, and Section 252(i)⁹ allows CLECs to opt in to an ICA previously negotiated between the ILEC and another CLEC. As explained below, Embarq has failed to comply with either requirement with respect to negotiating an ICA with Broadvox-CLEC. If CenturyLink/Embarq is allowed to purchase Qwest, as proposed, without safeguards, the merged entity may perpetuate and export Embarq's anticompetitive conduct to Qwest's service areas.

Broadvox-CLEC has received a certificate to operate as a local exchange carrier in multiple states and is in the midst of obtaining ICAs with the ILECs in those states. As part of its operations, Broadvox-CLEC anticipates that it will terminate voice over Internet Protocol ("VoIP") traffic. Broadvox-CLEC's entry to the market in Florida and Nevada has been slowed by its inability to obtain a suitable interconnection agreement (ICA) from CenturyLink for Florida or Nevada, the initial markets it wishes to enter.

As the FCC is well aware, intercarrier compensation for termination of VoIP is a contentious issue and disputes regarding VoIP termination charges has led to a substantial and ongoing amount of litigation at state regulatory commissions and in federal court. One of the primary issues in dispute is whether ILECs may treat VoIP traffic as though it were interexchange traffic, and thereby impose access charges.

Recognizing that litigation over VoIP termination is expensive, time-consuming and detrimental to its ability to focus its efforts on operational and business issues, Broadvox-CLEC contacted CenturyLink in June asking for an ICA with provisions that address termination charges for VoIP. Broadvox-CLEC anticipated that obtaining such ICA would be straightforward because it is aware that CenturyLink has an ICA with Level 3 that provides for reciprocal compensation for termination of VoIP. Unfortunately, this has not been the case.

It took more than a month of communications just to get CenturyLink to provide

⁸ 47 U.S.C. § 251(c)(1).

⁹ 47 U.S.C. § 252(i).

Broadvox-CLEC with a copy of the Level 3 ICA for review, and it stated that it was providing the ICA only as a “courtesy” because it likely would not allow Broadvox-CLEC to adopt the Level 3 ICA.¹⁰ CenturyLink has also stated (without explanation) that the Level 3 ICA “had an End Date” of December 31, 2007.¹¹ To the best of Broadvox-CLEC’s knowledge, Level 3 and CenturyLink continue to operate pursuant to the ICA, thus the ICA should be available for adoption.¹² Broadvox sought clarification from CenturyLink as to the meaning of the statement that the Level 3 ICA had an end date, but CenturyLink has not responded.¹³

CenturyLink’s unresponsiveness and its contention that it may refuse to allow Broadvox-CLEC to adopt an ICA with provisions offered to another CLEC for reciprocal compensation for termination of VoIP violates Sections 251(c) and 252(i) of the Act. Broadvox-CLEC believes that such blatant anticompetitive conduct could be perpetuated in an even greater service area if CenturyLink is allowed to merge with Qwest. If that were to occur, it would substantially worsen CLEC’s ability to compete in the Qwest service territory because Qwest has addressed the termination of VoIP in its ICA offerings with other CLECs. If Qwest were to adopt (voluntarily or not) CenturyLink’s anticompetitive behavior regarding ICA negotiations, competition will be harmed and the public interest will not be served. Therefore, Broadvox-CLEC believes that the FCC must adopt a set of safeguards, as it has in the recent CenturyLink/Embarq merger as well as other utility mergers, in order to protect the public interest.

III. The FCC Required Safeguards in CenturyLink/Embarq Merger To Protect CLECs From Anticompetitive Conduct And Should Do The Same Here

While CenturyLink/Embarq and Qwest make a blanket statement that their merger would not harm wholesale customers, their Application includes only one specific assurance – “existing wholesale arrangements will remain intact, with the surviving company honoring the terms of

¹⁰ Declaration of Anita Taff-Rice in Support of Broadvox-CLEC Opening Comments Opposing Merger of CenturyLink/Embarq With Qwest, at ¶¶4, 14 (“Taff-Rice Decl.”).

¹¹ Taff-Rice Decl., at ¶11.

¹² Taff-Rice Decl., at ¶13.

¹³ Taff-Rice Decl., at ¶12.

existing arrangements.¹⁴ Merely stating that it does not intend to repudiate existing contracts, however, is a feeble offer. At the same time that it has failed to provide meaningful assurance that it will comply with its obligation of fair dealing with CLECs, the Applicant companies have made statements elsewhere that call into question the intentions of the new entity.

CenturyLink/Embarq/Qwest have filed an application seeking local approval for the merger in Washington state. In that application, the companies state that one of the “key” benefits of the merger would be to create a financially stronger company that can “compete against cable telephony providers, wireless carriers, VoIP offerings, and CLECs”¹⁵ Given this statement, it is questionable whether a merged CenturyLink/Embarq and Qwest will use its increased strength to facilitate the operations of the CLECs against whom they directly compete.

If the merger goes forward, CenturyLink/Embarq will gain local exchange networks in four additional states -- Arizona, Utah, North Dakota, and South Dakota -- thereby increasing its operations to a total of 37 states.¹⁶ Thus, simply on a geographic basis, the merged entity will have an increased incentive and ability to discriminate against its wholesale customers by leveraging its increased footprint and adopting the worst practices of CenturyTel in the Embarq service area.

The FCC expressed these exact concerns when it reviewed the strikingly similar proposed merger of CenturyLink and Embarq just over a year ago. The FCC stated:

Consistent with the “Big Footprint” theory that the Commission addressed in prior BOC mergers, we find that the increase in the size of CenturyTel’s study area resulting from the merger may increase its incentive to engage in anticompetitive activity Additionally, to the extent that CenturyTel has been less willing to cooperate with competitors than Embarq -- as numerous commenters allege -- following the merger, CenturyTel may extend this behavior to the Embarq territories. In order to address these potential harms, the Applicants have proposed a series of voluntary commitments,

¹⁴ Application for Consent to Transfer Control, FCC WC Docket 10-110, May 10, 2010, at p. 37 (“Application”).

¹⁵ Joint Application for Expedited Approval of Indirect Control, Washington Public Utilities Docket No. UT-100820, May 13, 2010, at ¶30.

¹⁶ Application, at p. 6.

summarized above and included in Appendix C.¹⁷

The further merger of CenturyLink/Embarq with Qwest poses exactly the same concerns regarding perpetuation and export of anticompetitive practices. Therefore, the FCC should approve the merger only with specific conditions to guard against anticompetitive conduct by the newly merged entity.

IV. FCC Required Safeguards in CenturyLink/Embarq Merger To Protect CLECs

Broadvox is primarily concerned with obtaining a suitable ICA in a timely manner so that it may move forward with its market entry plans. As discussed above, it has already been delayed. To prevent further delay or other anti-competitive behavior, Broadvox-CLEC respectfully submits that, at a minimum,¹⁸ the FCC must include the following safeguards as a condition to approving the CenturyLink/Embarq/Qwest merger.

- The merged entity must allow CLECs to adopt an ICA that is available from any of the merged entities and use that same ICA with any of the other entities throughout the new service territory.
- The merged entity must allow CLECs to adopt an existing ICA within 30 days from request by the CLEC and must submit such adoption to the local state regulatory agency (if necessary) within seven days from the date of that adoption.
- The merged entity must allow CLECs to renew their existing ICA (whether it was in place prior to the merger or not) for at least one three-year term.
- If a CLEC does not want to renew an existing ICA in its entirety, the merged entity must agree to use the existing ICA as a starting point for negotiations if the CLEC so requests.
- The merged entity must commit to offer any waivers or amendments to existing ICAs to any other CLEC that requests it.

Without these safeguards, Broadvox-CLEC respectfully submits that the FCC cannot allow the merger to go forward because it will not serve the public interest.

V. Conclusion

For all of the foregoing reasons, Broadvox-CLEC submits that the FCC may not find that the CenturyLink/Embarq/Qwest is in the public interest unless appropriate safeguards are put in place to protect against anticompetitive behavior of the merged entity in the wholesale marketplace.

Dated: July 12, 2010

¹⁷ *CenturyTel/Embarq Merger Order*, at 8755 (internal citations omitted).

¹⁸ Broadvox CLEC reserves the right to comment in support of safeguards proposed by other parties.

Sincerely,



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**DECLARATION OF ANITA TAFF-RICE IN SUPPORT OF BROADVOX –CLEC
COMMENTS OPPOSING MERGER OF CENTURYLINK/EMBARQ WITH QWEST**

I, Anita Taff-Rice, hereby declare as follows:

1. I am over the age of 18. I have personal knowledge of the facts in this matter and, if called upon to testify, could and would do so.
2. I am outside counsel for Broadvox-CLEC and have been assisting it with attempting to obtain a suitable interconnection agreement (ICA) with CenturyLink for Florida and Nevada.
3. On June 2, 2010, I contacted CenturyLink via email requesting to enter into negotiations pursuant to Sections 251 and 252 of the Telecommunications Act for an Interconnection Agreement for Broadvox-CLEC.
4. On June 3, 2010, Mr. Steve Givner with CenturyLink contacted me by telephone to discuss Broadvox-CLEC's request for an ICA. I informed Mr. Givner that Broadvox was aware that CenturyLink has an ICA with Level 3 that includes a provision for the reciprocal compensation for termination of VoIP traffic, and requested a copy of that ICA for review and possible adoption.
5. Mr. Givner responded that he did not think the Level 3 ICA would be adoptable for Broadvox-CLEC because it contained several provisions, such as large traffic volume requirements, that likely render the Level 3 ICA unusable for Broadvox-CLEC.
6. In response to Mr. Givner's depiction of the Level 3 ICA, I agreed to review CenturyLink's standard ICA instead, but stated that if the standard ICA was not suitable, Broadvox would reiterate its request for a copy of the Level 3 ICA for review.
7. On June 4, 2001, Mr. Givner provided a copy of an ICA that he described as being CenturyLink's "standard" agreement.
8. I reviewed the ICA provided and discussed it with my client. It was determined that the ICA is not suitable because its only reference to termination of VoIP traffic would allow access charges to be assessed on such traffic.
9. On June 18, 2010, I notified Mr. Givner via email that Broadvox-CLEC had determined that CenturyLink's standard ICA would not meet its needs because it did not include a suitable provision for the termination of VoIP traffic. I then reiterated my request for a copy of the Level 3 agreement and any other ICA that includes a provision for the termination of VoIP traffic.
10. On June 21, 2010, Mr. Givner responded via email that he believed the standard ICA had an adequate provision for VoIP termination charges, but that CenturyLink had been updating its ICA language and proposed alternate language that would require Broadvox-CLEC to "indicate the geographical location of the actual IP caller location, not the location where the call enters the PSTN." If Broadvox-CLEC were unable to provide such geographical information, CenturyLink would assess access charges on IP-originated traffic.
11. In the same June 21 email, Mr. Givner again declined to provide a copy of the Level 3 agreement for review, and stated that the Level 3 ICA "had an End Date" of December 31, 2007.
12. In a responsive email on June 21, 2010, I asked Mr. Givner for clarification of his statement regarding the "End Date" of the Level 3 ICA. Specifically I asked whether he was asserting that the Level 3 ICA has terminated or been noticed for termination.
13. It is my understanding that regardless of whether the term of the Level 3 ICA has expired, the parties continue to exchange traffic pursuant to that ICA in an evergreen status. Therefore, it is my opinion that the Level 3 ICA is available for adoption by Broadvox-CLEC.

14. On July 8, 2010, Mr. Givner finally provided a copy of Level 3 ICA but he characterized it as only a “courtesy” copy and reiterated his position that Broadvox-CLEC likely would not be allowed to adopt the ICA.

I declare under penalty of perjury of the laws of the United States that these facts are true to the best of my knowledge and belief.


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Counsel for Broadvox-CLEC